

Committee on Resources

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Statement of Edward R. Osann
before the
Subcommittee on Water and Power
Committee on Resources
U. S. House of Representatives

regarding

H. R. ___, the Water Supply, Reliability, and Environmental Improvement Act
and H. R. 2641, the CALFED Bay-Delta Authorization Act

July 24, 2003

My name is Edward R. Osann and I am President of Potomac Resources, Inc. I am a consultant to the Natural Resources Defense Council's Western Water Project, and am appearing today on their behalf.

The Natural Resources Defense Council is a national, non-profit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 550,000 members nationwide, served from offices in New York, Washington, Los Angeles, and San Francisco. Thank you for inviting NRDC to testify here today.

Title I -- Competitive Grant Program

We commend you, Mr. Chairman, for your recognition of the importance of accelerating the deployment of advanced technologies for desalination and water reuse, as evidenced by Title I of the new bill. While we applaud the establishment of a competitive grant program for this purpose, we are concerned that certain features of this title may prove to be unworkable, and ultimately frustrate the accomplishment of the important objectives that you seek and that we support. We look forward to performing a more thorough review of Title I and would appreciate the opportunity to submit our recommendations for the record to strengthen this important proposal.

Title II -- CALFED

NRDC has been involved in CALFED since its inception and has followed closely proposed CALFED legislation. We strongly support the CALFED approach of finding integrated solutions to California's complex water supply problems, and we support the balanced implementation of the CALFED Record of Decision (ROD). NRDC has demonstrated this support by helping to negotiate and pass Proposition 50, which is providing well over a billion dollars to implement the CALFED program.

Unfortunately, during the past year, a series of actions have demonstrated the Bush Administration's lack of commitment to the implementation of CALFED pursuant to the ROD. These actions should be carefully considered in crafting CALFED authorizing legislation. This disturbing pattern is discussed in greater detail in the attached comments regarding S. 1097, the CALFED bill introduced by Senators Feinstein and Boxer. In short, these actions include decisions to undermine, ignore, and defund the CALFED program.

Obviously, Mr. Chairman, we have had little time to do justice to an analysis of the new bill that was introduced yesterday. In the near future, we will provide you with more detailed written comments. Our attached comments on S. 1097 explain our position regarding a number of issues that the House must also address in CALFED legislation. We hope that they will be of use to this subcommittee.

Principles for Successful CALFED Legislation

To assist the subcommittee's deliberations on CALFED, we offer six principles that we believe will be central to any successful CALFED authorizing bill. Our comments on S. 1097 include recommendations in each of these areas.

Consistency with the Record of Decision: The ROD is a carefully crafted document, and continuing support for the CALFED program will depend on respecting its structure. Its constraints and its interconnections were developed in close consultation with agencies and stakeholders. The Department of the Interior and other responsible agencies must take great care to ensure that their actions are consistent with the requirements of the ROD. Unfortunately, as previously discussed, at this point, it is clear that Interior does not support the ROD. We therefore urge that specific ROD requirements be included in this legislation. Further, we recommend that CALFED legislation avoid creating definitions and programs that are not taken from the ROD.

Beneficiary Pays: In the past, massive taxpayer subsidies have encouraged wasteful and environmentally destructive water projects and practices. The CALFED ROD clearly indicates that any new CALFED surface storage facilities will not be funded as they have been in the past. The ROD also calls for new user fees to help finance the program. These requirements are also consistent with the Department of Interior's Water 2025 strategy. This fiscally responsible approach will eliminate the financing mechanisms that have, for some users, disguised the fact that conservation, wastewater reclamation, improved groundwater management and, in some cases, land retirement and transfers, are the fastest and cheapest sources of additional water supply. It will also provide cost-based incentives for water users to conserve.

Project-Specific Authorizations and Permits: The ROD clearly indicates the need for project-specific authorizations and permits for large potential CALFED construction projects. We recommend that these requirements be carefully reflected in authorizing legislation.

Consistency with State and Federal Law: The ROD was carefully written to reflect state and federal legal requirements. Authorizing legislation should also require implementation of the program to be consistent with state and federal law.

Balanced Implementation: Unfortunately, as our detailed comments on S. 1097 indicate, several portions of the CALFED program are falling behind in implementation. Maintaining a successful program means maintaining balanced implementation, consistent with the requirements of the ROD. This does not mean, however, that every project discussed in the ROD will be constructed. Indeed, the ROD indicates that balanced implementation may proceed even if some proposed projects prove to be infeasible.

Avoid Ongoing Litigation: Drainage and water supply delivery "assurances," for example, are the subjects of ongoing litigation. CALFED legislation should be designed to avoid divisive, and unnecessary, provisions in these areas.

Key Concerns with the New Legislation

Upon initial review, we have identified a number of provisions that we believe conflict with these principles and that represent major obstacles to a successful CALFED program. I will discuss some of these concerns briefly. (All page numbers below refer to the draft bill print dated July 21, 2003 (5:27 PM).)

Ambiguous Authorization. What is CALFED? What does this bill authorize federal agencies to do? Neither the definitions (p. 3) nor the statement of authorization (p. 17) nor the authorization of appropriations (p. 48) clearly directs the Administration to implement the CALFED program *as defined in the ROD, pursuant to the ROD, or consistent with the requirements of the ROD*. This is a major obstacle that will fail to correct

serious problems in the Administration's current approach to CALFED and lead to additional conflicts with the State of California. Without such a requirement, the federal CALFED effort will be cut adrift. Our comments on S. 1097 outline our recommendations for a straightforward approach that reflects the requirements of the Record of Decision. We look forward to an opportunity to support a bipartisan bill that would direct Interior and other agencies to implement CALFED in a manner consistent with the ROD.

Clean Water Act Rollback. (p. 19) The bill would restrict the alternatives that could be considered in Clean Water Act permitting. This represents a serious and unwarranted rollback of federal environmental law. In light of the lack of a ROD consistency requirement, it also leads to an unfortunate irony. The Department of the Interior could implement nearly any water project in California, due to the lack of a ROD consistency requirement. However, this provision would limit the alternatives to those actions that could be considered. In short, it does not require Interior's proposed projects to be consistent with the ROD, but it does require alternatives to that project to be consistent with the ROD.

Automatic authorization of construction. (p. 21) The bill contains a provision that would eliminate the requirement for any subsequent Congressional authorization for billion dollar water storage construction projects. Such language is inconsistent with the ROD. It is also inconsistent with the long standing practices of the Bureau of Reclamation, and its disapproval mechanism is of doubtful constitutionality. If CALFED storage projects can be shown to be good investments, they will obtain Congressional authorization.

Delta Pumps (p. 25). The provision regarding Delta pumping requires this project to be consistent with some, but not all, state laws. It also fails to include the requirement in the ROD that the project should only move forward if it will not harm fishery protection.

Obstacles to environmental restoration. (pp. 32-36) The bill contains a number of new provisions, not included in the ROD that would have the effect of creating new legal requirements, slowing down, or stopping altogether, federal involvement in the CALFED ecosystem restoration program. These requirements are not contained in the ROD and are not applied to other programs.

Reapplication of appropriated funds. (p. 49) The bill would allow Interior to take money appropriated by Congress for one CALFED action and spend that money on storage and conveyance. We believe that such thwarting of Congressional directions is inappropriate. In addition, by favoring only some program elements, it clearly is not designed to lead to a balanced program.

Compliance with current law. In several locations (pp. 19, 25, 51, and elsewhere), the bill fails to require compliance with existing state and federal law.

Mr. Chairman, as I previously mentioned, we will provide detailed comments regarding how these principles can best be reflected in your bill. However, without amendments to these provisions, NRDC opposes the bill.

H. R. 2641

Turning briefly to the other CALFED legislation before the subcommittee today, we have had a bit more time to analyze H. R. 2641, the CALFED authorizing legislation introduced by Representatives Miller and Tauscher. We would like to commend the sponsors of this bill for including several provisions designed to address key concerns regarding CALFED and S. 1097. These improvements include:

Clarifying the applicability of state and federal law;

The inclusion of key CALFED requirements regarding the South Delta Improvement Project and screened through-Delta diversion investigations;

The elimination of an unnecessary drainage provision;

Changes to the refuge water supply provision designed to maintain Interior's focus on legally-mandated refuge supplies;

The addition of the CALFED provision requiring the development of a state-wide groundwater management program; and

Additional detail toward a credible beneficiary pays financing strategy.

We commend each of these provisions to the attention of the subcommittee.

Conclusion

In closing, we believe that the cooperative and integrated approach embodied in CALFED is the best strategy to restore the Bay-Delta ecosystem and improve water quality and water supply reliability. The genius of the CALFED program is in recognizing the wisdom, indeed the imperative, of solving these problems together. We urge you to ensure that authorizing legislation, and Interior's implementation of the CALFED program, reflect this approach.

We look forward to continuing to work with members of the subcommittee. We would be pleased to offer specific language regarding our recommendations.

Thank you for the opportunity to present these views.

Attachments:

1. NRDC Comments on S 1097

Objectives and solution principles of the CALFED Bay-Delta Program as stated in the Record of Decision

July 18, 2003

The Honorable Dianne Feinstein

United States Senate

Washington, DC 20510

Re: S 1097, CALFED Authorizing Legislation

Dear Senator Feinstein:

On behalf of the more than 550,000 members of NRDC, I am writing to offer our comments and recommendations for further refinements to your CALFED authorizing legislation, S 1097. As you know, NRDC has been deeply involved in the CALFED program since its inception. We strongly support the CALFED approach of finding integrated solutions to California's water supply problems, and we support the balanced implementation of the CALFED Record of Decision (ROD). NRDC recently demonstrated this support by helping to negotiate and pass Proposition 50, which is providing billions of dollars to implement the CALFED program.

CALFED authorizing legislation has gone through many permutations in the past few years. NRDC has offered comments throughout this process. As you also know, NRDC supported one version of your CALFED authorizing legislation (see our letter of January 31, 2002). However, S 1097 differs significantly from that bill. We thank you for your continuing commitment to resolving California's water issues and look forward to continuing to work with you.

Unfortunately, during the past year, several actions have demonstrated the Bush Administration's lack of commitment to the CALFED approach and support for the ROD. These actions should be carefully considered in crafting CALFED authorizing legislation. These actions include:

Weakening Environmental Protections and the Environmental Water Account: The Department of Interior has recently issued new rules regarding the allocation of water to the environment under section 3406(b)(2) of the Central Valley Project Improvement Act (CVPIA). The CALFED ROD included the careful resolution of issues regarding the implementation of this section of the CVPIA. This resolution served as a foundation of the CALFED strategy to resolve issues related to Delta water management. This foundational role is explicitly reflected in the ROD, as well as in CALFED's NEPA documents and the Biological Opinions of fisheries agencies. Unfortunately, Interior chose not to defend the ROD and their own CVPIA decision, in a suit brought by the Westlands Water District. Instead, Interior simply capitulated. This decision undermined the ROD and significantly weakened environmental protection. This decision went beyond the issues under consideration in federal court. It also directly undermined the regulatory baseline of the Environmental Water Account (EWA) (ROD, p. 56) - thus jeopardizing a CALFED program designed to provide increased environmental protection and improved water supply reliability. Finally, in making this decision, Interior failed to coordinate meaningfully with the State and all interested stakeholders - two cornerstones of the CALFED process. This decision demonstrates a fundamental lack of support for the ROD.

Ignoring ROD Requirements Regarding Upper San Joaquin River Storage: The CALFED ROD indicates that the Bureau of Reclamation will study potential new surface storage, or its equivalent, on the Upper San Joaquin River for the purpose of restoring the river and improving water quality (ROD, p. 45). Unfortunately, however, the Bureau's recently released "Investigation Report" regarding the Upper San Joaquin River fails to reflect the requirements of the ROD. The Bureau has excluded all non-surface storage alternatives (e.g. groundwater, conservation) from its investigation. The Bureau has also abandoned the project purpose included in the ROD. The Bureau's report describes a project designed to deliver water to the West side of the San Joaquin Valley. Not only does this report ignore San Joaquin River restoration and water quality, the project it describes would exacerbate both of these problems - the very problems that the CALFED ROD intended this project to address. Finally, the Bureau's report fails to discuss how the CALFED beneficiary pays provision would be implemented, were a surface storage facility to be constructed in this area.

CVP Contracts that Undermine CALFED: The Bureau's current negotiations regarding the renewal of CVP contracts ignores the CALFED program. In the Sacramento Valley, the Bureau's draft contracts propose to deliver more water than Sacramento Valley users have used in recent years. In fact, the Bureau's own analysis reveals that the draft contracts propose to commit to deliver more water than these contractors are capable of using beneficially. The Bureau has not studied the impact that this decision could have on the environment, on other water users or on the carefully crafted Delta strategy in the ROD.

Failing to Fund CALFED: The Administration has failed to propose adequate funding for the CALFED program. (Existing authorizations would allow the Administration to propose funding for much of the CALFED program.) In fact, last December, Interior proposed a funding package for a land retirement settlement with Westlands farmers that would have diverted funds from CALFED-related activities. This proposal was opposed by the entire California House delegation.

The state of California has increasingly expressed concern regarding the Bush Administration's lack of support for CALFED. CALFED authorizing legislation will only succeed in supporting a balanced program if it is carefully designed to address the problems discussed above. We look forward to working with you to craft a bill that will address these problems, that we can support and that will strengthen the California economy and environment. With this in mind, we offer the following comments and recommendations. We begin by noting progress made in several areas:

Consistency with the ROD: We thank you for clarifying, in section 3(b), that implementation of the CALFED program is subject to the "constraints of the Record of Decision". However, given the concerns discussed above, additional detail is required. We offer several recommendations below to ensure that Interior's implementation of key provisions reflects the explicit requirements of the ROD.

Meeting Water Quality Standards: We are pleased that section 3(c)(3)(I)(i)(10) reflects the need to develop and implement a plan to meet "all existing water quality standards for which the State and Federal water projects have responsibility." In particular, we believe that the Bureau must prepare a plan to meet State flow and water quality standards for the San Joaquin River and Delta. The State Water Resources Control Board has found that the Bureau is responsible for ongoing violations of these standards. In addition, a state court recently threw out the current plan to meet these standards, which is supported by the Bureau. A new plan is clearly required.

Clean Water Act Permitting: NRDC has consistently recommended that CALFED legislation clarify that any CALFED surface storage projects will require permits under Section 404(a) of the Clean Water Act. S 1097 references this requirement in Section 5(b)(8). However, to ensure that this provision will have the intended effect, we recommend moving it to the feasibility study section (5(d)).

Authorizing Land and Water Acquisitions: We are pleased that your bill explicitly authorizes the purchase of land and water as part of the CALFED ecosystem restoration program (3(c)(3)(G)(viii)). This authorization is important to CALFED's success. However, the bill now includes another hurdle to ecosystem restoration, discussed below.

We also offer the following recommendations for further improvements to S 1097:

Groundwater Management: The ROD indicates that "CALFED agencies will support legislation that encourages groundwater management at the sub-basin level" (ROD, p. 47). We are not aware of progress toward the enactment of this legislation. This would likely be state legislation. However, Interior could play an important role in its development. We recommend that the discussion of groundwater in section 3(c)(3)(A)(iii) be amended to include specific reference to the development and implementation of a state-wide groundwater management program. H.R. 2641, for example, includes such a provision.

User Fees: The ROD calls for the implementation of user fees to support the CALFED program (ROD, p. 38). We recommend that S 1097 include a specific authorization for Interior to participate in the development of a comprehensive package of user fees designed to support the CALFED program and reflect the benefits received by specific users. Once funds from Proposition 50 are fully allocated, such user fees will be essential to maintaining a healthy CALFED program. This user fee, and the "beneficiary pays" section that follows, are also consistent with Interior's Water 2025 strategy.

Beneficiary Pays: We are pleased that S 1097 discusses the ROD's "beneficiary pays" requirement for the financing of any new surface storage facilities (5(d)). However, this provision currently lacks sufficient detail. Unfortunately, CALFED has failed to provide a definition of this ROD requirement. Unless specific requirements are included in this legislation, some stakeholders and the Bureau may rely on the very financing mechanisms that the CALFED plan seeks to change. We recommend that this section be amended to require a beneficiary pays financing plan including:

The full recovery of all federal expenses regarding capital, interest, mitigation, operations and maintenance; and

A "least-cost" test regarding any public benefits, to ensure the proper allocation of any costs to the public.

The EWA and the Regulatory Baseline: The EWA will only function as anticipated if the regulatory baseline described in the ROD is maintained (ROD, p. 55). Unfortunately, as discussed in our introductory comments, this regulatory baseline is no longer intact. We recommend that the authorization of the EWA (3(c)(3)(E)) require that the first priority for any federal funds for the EWA be the restoration and maintenance of this regulatory baseline.

South Delta Improvement Program: As discussed above, the CALFED regulatory baseline for the current operations of Delta diversion facilities is no longer intact. If CALFED agencies cannot successfully implement this strategy at the current level of Delta diversions, it raises serious concerns about the wisdom of further increases in the pumping limits. Indeed, the ROD clearly states that the proposed increase should only take place if it avoids "adverse impacts to fishery protection"(ROD, p. 49) We recommend that section 3(c)(3)(B)(i)(1) be amended to indicate that the proposed increases to 8,500 cfs and 10,300 cfs may only move forward if the level of environmental protection in the regulatory baseline is restored and if the proposed operations do not cause "adverse impacts to fishery protection."

North Delta Actions: To assure that implementation of this project is consistent with the ROD, we recommend that Section 3(c)(3)(B)(ii)(II) be amended to include the following language, "including full consideration of the constraints identified in the Record of Decision regarding Delta Cross Channel operations strategies, water quality impacts, technical viability, and fishery concerns".

The Need for Specific Project Authorizations: Section 3(c)(3)(A) clearly, and appropriately, indicates that this section does not provide authorizations required for the construction of surface storage facilities. However, we are concerned that some may interpret sections 3(b) and 3(c)(3)(F) as providing this authorization. In order to avoid potential confusion in the future, we recommend that these sections be amended to clarify that any construction of surface storage facilities will require additional project-specific congressional authorization. Alternatively, a provision could be inserted requiring that all projects that would receive a total federal investment of more than \$20 million must obtain a project-specific authorization.

The Project Purpose for Proposed New Surface Storage Facilities: As discussed above, the Bureau is undertaking studies on the Upper San Joaquin River that are inconsistent with the clear requirements of the ROD. We recommend that, for each proposed facility discussed, section 3(c)(3)(A) be amended to reflect the project purpose in the ROD. In the case of the Upper San Joaquin River, this project purpose is to contribute to the "restoration of and improve water quality for the San Joaquin River and facilitate conjunctive water management and water exchanges that improve the quality of water deliveries to urban communities" (ROD, p. 45).

Drainage Authorization: We continue to recommend that section 3(c)(3)(I)(i) be deleted. This provision addresses an issue that is currently in litigation. We appreciate the intent behind the addition of section 3(c)(3)(I)(i)(3). However, Interior has demonstrated that no further authorization is required in this area. This language should be deleted unless clear constraints are added to assure that, in the future, Interior's drainage program is coordinated with the state and other stakeholders, and integrated into a balanced CALFED program.

Diversification of Refuge Water Supplies: We recommend that section 3(c)(3)(M) be eliminated. The Department of Interior has not prepared a plan for the diversification of refuge water supplies. It is not possible, therefore, to determine how these funds would be spent or if there would be any benefit for wildlife refuges. The first priority regarding refuge water supplies

should be the full implementation of the legally required level 2 and level 4 supplies. We are concerned that, as written, this provision could harm refugees by diverting attention from the provision of required refuge supplies and result in the expenditure of tens of millions of taxpayer dollars simply to purchase water for CVP contractors. Such purchases would be inappropriate.

Land Acquisition Determination: We recommend that section 4(f) be stricken. We submit that state and federal agencies will be compelled by budget realities to avoid unnecessary land acquisitions. This vague requirement for a finding regarding the availability of public land for ecosystem restoration purposes would be certain to lead to confusion and litigation.

San Luis Lowpoint: Given how little progress has been made in securing permanent Environmental Water Account assets (ROD, p. 57), we recommend that section 3(c)(3)(B)(iv) be amended to provide that at least half of the new storage created by this project will be dedicated to the Environmental Water Account.

Statement of Balanced Implementation: We recommend that the statement of balance required by Section 5(b) be amended to include reports regarding progress in areas that have fallen far behind in the CALFED program, including: the achievement of the water purchase targets in the Ecosystem Restoration Program (ROD, p. 36); the restoration of the EWA regulatory baseline; implementation of water measurement requirements (ROD, p. 63); BMP certification (ROD, p. 62); implementation of a state-wide groundwater management program; and the implementation of user fees.

Monthly Report Regarding South of Delta Deliveries: Section 4(g) currently requires a monthly report regarding South of Delta water deliveries. We believe that reports at this frequency would serve no useful purpose. In fact, we are concerned that this requirement would erroneously suggest that this provision of the ROD is a higher congressional priority than other program elements. Further, this provision is unnecessary because the annual report required in Section 5 would result in a report regarding the entire CALFED program.

Funding for Water Measurement and BMP Certification: We recommend that an additional \$10 million be allocated to water measurement and BMP certification in sections 3(c)(3)(C)(iv) and (v). These programs have been falling far behind in the CALFED program.

The EBMUD Contract: For the past few years, several environmental groups have been talking with EBMUD regarding the project they are in the process of evaluating. We recommend that the reference to the EBMUD contract in section 3(c)(3)(i)(8) be eliminated and that section 5(11) be amended to require a report on progress in developing a broadly supported project under this Bureau contract. Given that EBMUD and Sacramento County are not proposing the construction of a federal project, we believe that it would be most appropriately addressed through the report regarding progress in implementing complementary actions.

A Short "Clean" Authorizing Bill: Finally, as you know, NRDC has consistently recommended that you consider a carefully crafted short CALFED authorizing bill. Experience over the past year has shown that it is extremely difficult to capture the detail and interconnections of the CALFED ROD in a long bill. We believe that a simple bill that is carefully crafted to reflect the constraints of the ROD and to clarify the need for additional project-specific authorizations and permits, could be the most productive path.

Thank you again for your leadership in the CALFED program. We look forward to continuing to work with you.

Sincerely,

Barry Nelson

Senior Policy Analyst

Cc: Senator Barbara Boxer

Chairman Pete Domenici

Senator Jeff Bingaman

Congressman Ken Calvert

Congressman George Miller

Congresswoman Ellen Tauscher

Assistant Interior Secretary Bennett Raley

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Patrick Wright, CALFE

CALFED Bay-Delta Program August 28, 2000

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